1997

Thor B. Roundy v. Reza Semnani : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

THOR B. ROUNDY, Plaintiff and Appellant, vs. REZA SEMNANI, Defendant and Appellee.	:	APPELLEE'S BRIEF No. 970568CA Priority No. 15

APPEAL FROM JUDGMENT AND RELATED ORDER OF THE HONORABLE WILLIAM W. BARRETT FOR THE THIRD DISTRICT COURT, DIVISION II

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II. STATEMENT OF JURISDICTION.

This is an appeal of a final judgment and related order entered after trial on the merits by The Honorable William W. Barrett for the Third District Court, Division II. The Utah Court of Appeals has jurisdiction to decide this appeal pursuant to Utah Code Ann. Section 78-2a-3(2)(j) and Rule 3(a) of the Utah Rules of Appellate Procedure. Under Utah Rule of Appellate Procedure 29(b), the case falls under oral argument priority 15.

III. DETERMINATIVE STATUTES.

Utah Rule of Civil Procedure 54(d)(1) is determinative of a portion of appellant's appeal. It states:

> (1) **To whom awarded**. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be awarded as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the State if Utah, its officers and agencies shall be imposed only to the extent permitted by law.

Utah Rule of Civil Procedure 54(d)(1).

IV. STATEMENT OF THE CASE.

This case is to determine the proper lawyer's fees the appellant, a lawyer, is to be awarded for a lawsuit in which he represented the appellee and recovered $3,250.00 in settlement. Appellant claimed he should be awarded either a 100% contingent

fee according to an unsigned fee agreement or a $10,000 fee award in quantum meruit. Appellee claimed the appellant should be awarded a one-third contingent fee plus costs, according to a verbal agreement between the parties which appellee memorialized in correspondence and which appellee made a condition for appellant's acceptance of the settlement offers on appellee's behalf.

The trial court entered judgment according to appellee's theory of the case, awarding appellant a one-third contingent fee plus costs in the previous lawsuit, plus sanctions previously ordered against appellee, denying appellant's application for costs in this action. Appellee brought a Rule 59(a) motion to amend the judgment based on insufficiency of the evidence and error in law. The trial court denied the motion. After judgment, on appellee's motion, the trial court ordered appellant to pay to appellee the balance of the settlement proceeds less the judgment amount (the order). Appellant appeals from the judgment and order.

V. STATEMENT OF FACTS.

In December, 1994, appellee sought appellant's advice regarding a landlord tenant dispute and a minor assault by a roommate. Record on Appeal, pp. 729:4-730:4. From that dispute, appellant brought a lawsuit for multiple claims of conspiracy against the landlord, the other tenant, the house sitter, the

landlord's lawyer and the lawyer's firm, styled Reza Semnani v. Carolyn Clark, Brian Barkey, Robert Rees and Fabian & Clendenin, #950901241PI (the previous lawsuit). The claims against the lawyer and law firm were dismissed with prejudice and found to be frivolous. Defendant's Exhibit 15; Record on Appeal, pp. 782:19-784:14 & 836:24-837:1. Shortly after those claims were dismissed, the landlord (Clark) and other tenant (Barkey) settled the claims against them for $3,250.00. Record on Appeal pp. 769:22-770:4.

Appellant never had a formal, written contract with appellee. Although there was no written agreement between them, appellant initiated the lawsuit and otherwise represented appellee. At various times, including on or about January 18, 1995, and eleven months later on or about December 15, 1995, appellant presented to appellee a proposed, retroactive fee agreement (the proposed agreement). Plaintiff's Exhibit 5; Defendant's Exhibit 2; Record on Appeal pp. 758:8-22 & 808:19-23. The proposed agreement allowed for a 100% contingent fee. Appellee never signed the proposed agreement and never agreed to any of its terms. Substantial confusion over appellant's compensation ensued. Record on Appeal pg. 898:18-23 & 899:11-24. Appellee resolved that confusion by giving appellant authority to accept the Clark and Barkey offers on condition that appellant accept a one-third contingent fee. Record on Appeal, pg. 899:11-

900:8. Appellant assented to that condition and accepted the offers on those terms. Id. Plaintiff's Exhibit 11, pp. 10 & 11.

Appellant accepted the $3250.00 from Clark and Barkey but refused to tender any portion of it to appellee, claiming to be entitled to the entire settlement proceeds. Defendant's Exhibit 13; Record on Appeal, pg. 770:2-4. Appellant also had accepted from Clark a check for the return of appellee's rental deposit but refused to give it to appellee. Record on Appeal, pg. 770:5-21.

VI. SUMMARY OF ARGUMENT.

A. THERE IS AMPLE EVIDENCE TO SUPPORT THE TRIAL COURT'S JUDGMENT.

The Court of Appeals "presumes the findings of fact of the trial court to be correct." Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah App. 1987). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." U.R.C.P. 52(a). Here, the trial court painstakingly considered the conflicting evidence before making its findings. There is clear and ample evidence to support them.

B. APPELLANT FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF HIS APPEAL.

To challenge the trial court's fact findings successfully, it is the appellant's burden to cite all the evidence in the

record in support of the judgment, including all reasonable inferences, and then demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the finding under attack. Grayson Roper, Ltd. v. Finlinson, 782 P.2d 467 (Utah 1989); Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Here, appellant has done just the opposite. Appellant merely has presented the evidence favorable to his case and in the light least favorable to the trial court's judgment. It is neither this Court's nor appellee's burden to search the record for evidence which supports the judgment. Appellant has failed altogether to carry his burden to marshall the evidence.

C. THE TRIAL COURT PROPERLY DISMISSED THE CLAIM FOR QUANTUM MERUIT.

Where there is an enforceable, expressed contract, it will be enforced in lieu of the equitable remedy of quantum meruit. Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421, 425 (Utah App. 1994). Here, based on its finding of an express, verbal agreement between the parties by which appellant would accept a one-third contingent fee, the trial court correctly concluded that the equitable remedy of quantum meruit did not apply. Record on Appeal, pg. 900:19-25.

D. THE TRIAL COURT'S JUDGMENT ALSO MAY BE UPHELD ON A THEORY OF QUANTUM MERUIT.

The Court of Appeals may uphold the trial court's judgment on any proper grounds. DeBry v. Noble, 889 P.2d 428, 444 (Utah

1995). Here, the trial court's judgment may be upheld even if quantum meruit applies to appellant's claims.

E. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CLAIM FOR COSTS.

The party whose theory of the case is accepted by the trier of fact prevails. Here, appellant proposed he should awarded a 100% contingent fee or a quantum meruit award of $9,999.99. Record on Appeal, pg. Appellee proposed appellant should be awarded a one-third contingent fee plus costs in the previous action. The Court awarded appellant a one-third contingent fee plus costs in the previous action. Although the judgment awards money to appellant it is in the amount which appellee proposed. Appellee prevailed. Appellee could be awarded costs but he incurred no recoverable costs and submitted no cost bill. The trial court's judgment to charge neither party costs is within its discretion and should stand.

F. APPELLEE APPLIES TO RECOVER THE FEES HE INCURS TO DEFEND AGAINST THIS FRIVOLOUS APPEAL.

Pursuant to Utah Rule of Appellate Procedure 33, appellee applies to the Court to recover the attorney's fees he will spend in defense of this appeal. Appellee understands the Rule 33 remedy only applies in egregious cases and he makes this application cautiously and advisedly. See Porco v. Porco, 752 P.2d 365, (Utah Ct. App. 1988). But the present appeal has no reasonable legal or factual basis, has been taken with no reasonable likelihood of prevailing, is frivolous, and never

should have been brought. See Id.; O'Brien v. Rush, 744 P.2d 306, 309-11 (Utah Ct. App. 1987). Appellee respectfully requests the Court to award him the attorney's fees he will incur to defend this frivolous appeal.

VII. ARGUMENT.

A. THERE IS AMPLE EVIDENCE TO SUPPORT THE TRIAL COURT'S JUDGMENT.

The Court of Appeals "presumes the findings of fact of the trial court to be correct." Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah App. 1987). On review, the Court "views the evidences and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings." Id. *quoting* Horton v. Horton, 695 P.2d 102, 106 (Utah 1984). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." U.R.C.P. 52(a). Here, the trial court painstakingly considered the conflicting evidence before making its findings. There is clear and ample evidence to support them. Two examples suffice.

First, the trial court found appellee never signed or agreed to the proposed fee agreement appellant attempted to enforce by this action. Record on Appeal, pg. 898:12-23. In support of that finding, the trial court considered evidence that appellant

proposed the fee agreement to appellee several different times. Appellant's Exhibit 5; Appellee's Exhibit 2; Record on Appeal pp. 758:8-22 & 808:19-23. Each time appellant proposed the agreement, appellee rejected it. 807:25-809:8. Appellee expressed in correspondence that he never agreed to the proposed agreement and was not bound by its terms. Defendant's Exhibit 6. On January 5, 1996, appellant sent appellee a letter which states:

> To the extent you agree to all of the terms of our written agreement as provided to you, there will be no attorney's fee relating to Robert Rees and Fabian & Clendenin other than the attorney's fee associated with the settlement received concerning Carolyn Clark and the attorney's fees associated with the rejected/ pending settlement offer/agreement concerning Brian Barkey.

Defendant's Exhibit 10. Thus, almost a year after appellant first presented to appellee the proposed fee agreement he acknowledged appellee had not agreed to it. Finally, appellant knew appellee had no money to pay appellant an hourly fee but represented him anyway, spending 123 hours to achieve the $3,250.00 settlement. Plaintiff's Exhibit's 1 & 3.

Second, the trial court found the parties had a verbal agreement by which appellee agreed to accept a one-third contingent fee. In support of that finding, there is overwhelming evidence that the parties had a verbal agreement memorialized by correspondence or an agreement expressed by the correspondence itself. Appellee expressly conditioned

appellant's authority to accept the settlement offers on appellant's taking a one-third contingent fee. In a December 12, 1995, letter to appellant, appellee memorializes the parties' prior verbal agreement that appellant take a one-third contingent fee and expresses that agreement as a condition to appellant's authority to accept both offers. Plaintiff's Exhibit 9. In a January 12, 1996, letter to appellant, appellee reiterates that condition as to the Barkey settlement. Plaintiff's Exhibit 11, pg. 10. In return correspondence, appellant expressed his assent to that condition and expresses he has accepted the Barkey offer on the basis of appellee's January 12, 1996, letter. Id, pg. 11.

Appellant argues the chronology of the correspondence seeking and giving authority to accept the Clark offer shows that appellee expressed the condition after appellant already had accepted the offer on appellee's behalf. That argument is belied by appellant's acceptance of that condition as to the Barkey offer. And there is ample evidence that the correspondence merely records a condition which appellee had imposed verbally before appellant accepted the Clark offer on appellee's behalf.

In a December 7, 1995, letter, appellant memorializes a telephone conversation between the parties and expresses his intent to accept the Clark offer the next day. Appellant's Exhibit 12. Appellant accepted the Clark offer by a letter dated December 8, 1995. Id. pg. 3. On December 12, 1995, appellee

faxed a letter to appellant which states he received appellant's December 7 letter the day before, on December 11, and states:

> Our verbal agreement was that I will pay you (the attorney), thirty-three percent of the proceeds I may receive in this lawsuit if you represent me. I have already paid you $200.00 for the court costs.
>
> Based on this agreement (above) only, you may accept settlement offers from both Miss Clark and Mr. Barkey at the same time (in the amount of three thousand dollars).

Appellee's Exhibit 3 (parentheses in original).

That exchange amply supports the trial court's finding that the parties had a verbal agreement prior to appellant's acceptance of the Clark offer which appellee's December 12, 1995, letter memorializes. That reasonable minds may draw different conclusions from that evidence is not sufficient ground on which to upset the trial court's finding. Pollesche v. Transamerican Ins. Co., 497 P.2d 236, 238 (Utah 1972). The trial court's findings are not clearly erroneous and its judgment should stand.

B. APPELLANT FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF HIS APPEAL.

To challenge the trial court's fact findings successfully, it is the appellant's burden to cite all the evidence in the record in support of the judgment, including all reasonable inferences, and then demonstrate why, even when viewed in the light most favorable to the trial court, the evidence is insufficient to support the finding under attack. Grayson Roper,

Ltd. v. Finlinson, 782 P.2d 467 (Utah 1989); Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Here, appellant has done just the opposite. Appellant merely has presented the evidence favorable to his case and in the light least favorable to the trial court's judgment. It is neither this Court's nor appellee's burden to search the record for evidence which supports the judgment. The following few examples reveal appellant failed to marshall and present the ample evidence in support of the trial court's judgment.

Appellant failed to present the evidence that appellee specifically conditioned appellant's authority to accept both settlement offers on appellant's taking a one-third contingent fee. The failure is especially marked as to the Barkey settlement, as follows:

In appellee's January 12, 1996, letter to appellant, appellee expresses the condition:

> Our verbal agreement has been that I will pay you thirty-three percent of any proceeds I may receive in this case. Based on this agreement, you may accept any settlement offer from Mr. Barkey.

Plaintiff's Exhibit 11, pg. 10.

In return correspondence, appellant expressed his assent to that condition and expresses he has accepted the Barkey offer on the basis of appellee's January 12, 1996, letter:

> I have reviewed your fax of January 12, 1996. I will accept $333.33 as my attorney fee with regard to the recovery to be received from Mr. Barkey. I have

> forwarded an acceptance of Mr. Barkey's offer to his attorney. A copy of that letter is enclosed.

Id, pg. 11.

Appellant's letter goes on to impose additional conditions on his willingness to accept a one-third contingent fee, but by then the deal was done. Id. Appellant already accepted the settlement offer on appellee's behalf. He cannot accept the condition, bind appellee to the settlement and unilaterally impose additional conditions on his agreement with appellee after the fact.

Appellant failed to reveal he presented the proposed agreement to appellee several times, including once on or about December 15, 1995, after he had represented appellee for almost a year, after the claims against the lawyer and law firm were dismissed and during the negotiations to settle the remaining claims. Record on Appeal, pp. 758:8 to 759:3, Defendant's Exhibit 2. Appellant's presenting the proposed fee agreement again in December reveals appellee had not agreed to the contract previously, as appellant has claimed. Appellant also fails to address the trial court's finding that appellant knew appellee had no funds to hire a lawyer other than on a contingent fee but represented him anyway, spending more than 123 hours to achieve the $3,250.00 in settlement. Record on Appeal, pg. 898:24-899:10; Plaintiff's Exhibits 1 & 3.

Appellant represented to this Court that the trial court rejected his claim based on the proposed fee agreement because appellant was unable to produce a signed contract. Appellant's Brief, pg 6. In truth, the trial court's finding was based on the evidence as revealed in appellee's brief and on substantial other evidence.

Finally, as to the trial court's failure to award appellant his costs in this action, appellant states in his brief: "All of the relief awarded was opposed by defendant." That simply is false. From start to finish, appellee's theory of the case was that appellant should be awarded a one-third contingent fee plus costs in the previous lawsuit. Record on Appeal, pg. 728:8-9 (opening statement), Record on Appeal, pg. 952; 5-10 (closing argument). The trial court accepted appellee's theory of the case and denied appellant's application for costs in this case.

Those are a few examples of appellant's myriad failures to reveal to this Court evidence in support of the trial court's judgment. Appellant has failed altogether to carry his burden to marshall the evidence.

C. THE TRIAL COURT PROPERLY DISMISSED THE CLAIM FOR QUANTUM MERUIT.

Where there is an enforceable, expressed contract, it will be enforced in lieu of the equitable remedy of quantum meruit. Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421, 425 (Utah App.

1994). Here, based on its finding of an express, verbal agreement between the parties by which appellant would accept a one-third contingent fee, the trial court correctly concluded that the equitable remedy of quantum meruit did not apply. Record on Appeal, pg. 900:19-25.

D. THE TRIAL COURT'S JUDGMENT ALSO MAY BE UPHELD ON A THEORY OF QUANTUM MERUIT.

The Court of Appeals may uphold the trial court's judgment on any proper grounds. DeBry v. Noble, 889 P.2d 428, 444 (Utah 1995). Here, the trial court's judgment may be upheld even if quantum meruit applies to appellant's claims.

Quantum meruit has two branches: "(1) contracts implied in law, also known as quasi contracts or unjust enrichment, which are not actions to enforce a contract but are actually actions to require restitution; and (2) contracts implied in fact, which are contracts established by conduct. Knight v. Post, 748 P.2d 1097 (Utah App. 1988).

1. Contract Implied in Law.

To prevail under a theory of implied in law contract or unjust enrichment, appellant must show three elements: (1) appellant conferred a benefit on appellee; (2) appellee was aware of the benefit; and (3) appellee "retained the benefit under such circumstances as to make it inequitable for him to retain the benefit without payment of its value." Knight, 748

P.2d at 1100. Thus, payment to appellant must relate in value to the benefit conferred. In specific, where the claim is for services, one must prove that the amount of labor used and charge for that labor are reasonable. Midwest Fabrication v. Woodex, Inc., 596 P.2d 581, 583 (Or. App. 1979)(claim for labor and materials).

Here, in fact, appellee has received no benefit because appellant refused to tender to him any of the small amounts recovered, including appellee's rental deposit which the landlord tendered to appellant instead of appellee. Defendant's Exhibit 13; Record on Appeal, pg. 770:2-21.. But in theory, appellee has received $3,250.00 as the proceeds of the lawsuit. Appellant claims to have spent over 123 hours to have obtained that $3,250.00 benefit and desires to be paid $10,000.00 for having conferred it. Plaintiff's Exhibits 1 & 3. To obtain that $3,250.00, appellant sued the landlord, the other tenant, the house sitter, the Robert Reese, the landlord's lawyer and Fabian & Clendenin, the lawyer's firm. The claims against the lawyer and law firm were dismissed with prejudice and found to be frivolous. Defendant's Exhibit 15; Record on Appeal, pp. 782:19-784:14 & 836:24-837:1. According to the express authority appellee gave appellant to accept those offers, appellant suggests that one-third of the $3,250.00 is a reasonable amount to pay appellant for the benefit he conferred on appellee.

2. Contract Implied in Fact.

To prevail under a theory of implied in fact contract, plaintiff must show three elements: (1) defendant requested plaintiff to perform the work; (2) defendant expected plaintiff to compensate him; and (3) defendant knew or should have known plaintiff expected compensation. Knight, 748 P.2d at 1100.

Once again, however, the amount of that compensation is the service's reasonable value. Davies v. Olsen, 746 P.2d 264, 269 (Utah App. 1987). "Technically, recovery in contract implied in fact is the amount the parties intended as the contract price. If that amount is unexpressed, courts will infer that the parties intended the amount to be the reasonable market value of the appellant's services." Davies v. Olsen, 746 P.2d 264, 269 (Utah App. 1987). Here, the evidence at trial revealed the parties expressly intended the contract price to be one-third of the settlement proceeds. Record on Appeal, pp. 899:25-900:8. But failing that evidence, the reasonable market value of appellant's services is the professional standard of one-third contingent on recovery.

E. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S CLAIM FOR COSTS.

The party whose theory of the case is accepted by the trier of fact prevails. "A prevailing party is one who prevails on a significant issue in the litigation and achieves some of the benefits sought therein." Frost v. Schroder & Co., Inc., 876 P.2d 126, 129 (Colo. App. 1994) *citing* Odenbaugh v. County of Weld, 809 P.2d 1059 (Colo. App. 1990). "In identifying a prevailing party for purposes of entitlement to an award of costs pursuant to [the applicable statute], the focus should be upon the countervailing claims and defenses asserted by the litigants, rather than upon incidental independent factors that may affect the ultimate monetary judgment." Frost, 876 P.2d at 129.

Here, appellant proposed he should awarded a 100% contingent fee or a quantum meruit award of $9,999.99. Record on Appeal, pg. Appellee proposed appellant should be awarded a one-third contingent fee plus costs in the previous action. The Court awarded appellant a one-third contingent fee plus costs in the previous action. Although the judgment awards money to appellant it is in the amount which appellee proposed. Appellee prevailed. Appellee could be awarded costs but he incurred no recoverable costs and submitted no cost bill.

Rule 54(d)(1) states in relevant part: "... costs shall be awarded as of course to the prevailing party unless the court otherwise directs..." Although cost awards are matters of

course, they are not mandatory as appellant argues. The trial court "can exercise reasonable discretion in regard to the allowance of costs..." Hatanaka v. Struhs, 738 P.2d 1052, 1055 (Utah Ct. App. 1989); Frampton v. Wilson, 605 P.2d 771, 773-74 (Utah 1980). The trial court's judgment to charge neither party costs is within its discretion and should stand.

F. APPELLEE APPLIES TO RECOVER THE FEES HE INCURS TO DEFEND AGAINST THIS FRIVOLOUS APPEAL.

Pursuant to Utah Rule of Appellate Procedure 33, appellee applies to the Court to recover the attorney's fees he will spend in defense of this appeal. Appellee understands the Rule 33 remedy only applies in egregious cases and he makes this application cautiously and advisedly. See Porco v. Porco, 752 P.2d 365, (Utah Ct. App. 1988). But the present appeal has no reasonable legal or factual basis, has been taken with no reasonable likelihood of prevailing, is frivolous, and never should have been brought. See Id.; O'Brien v. Rush, 744 P.2d 306, 309-11 (Utah Ct. App. 1987).

Appellant made no attempt to meet his burden to marshall the evidence. Likely, that is because if appellant had marshalled the evidence he could not make even a colorable argument the judgment should be set aside. Instead, he presented only the evidence favorable to his position in the light most favorable to the result he desires, not in the light most favorable to the

trial court's judgment. In doing so, appellant misrepresented to this Court the evidence before the trial court. Appellee respectfully requests the Court to award him the attorney's fees he will incur to defend this frivolous appeal.

VIII. CONCLUSION.

There is ample evidence to support the trial court's carefully made findings. They are not clearly erroneous. Appellant made no attempt to marshall the evidence which would have supported that conclusion.

The trial court accepted appellee's theory of the case and awarded appellant the amount appellee proposed. Appellee prevailed and the trial court did not abuse its discretion in denying appellant's application for costs.

Appellee respectfully requests the Court to deny this appeal and affirm the trial court's judgment. Finally, appellee requests the Court to award him the attorney's fees he will incur to defend this frivolous appeal.

Respectfully submitted on November 21, 1997.

Richard G. Hackwell

SERVICE CERTIFICATE

I certify that on November 21, 1997, two correct copies of the appellee's brief were mailed to the following:

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Dated November 21, 1997.